(1)

Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

DONALD ENGLISH,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
STATE OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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25pp

Questions Presented for Review

(1) Did the Seventh Circuit Court of Appeals follow Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed.2d 476 (1994)?

(2) Did joinder violate Federal Rules of Criminal Procedure 8(b)?

(3) Should petitioner's case have been severed pursuant to Federal Rule of Criminal Procedure 14?

(4) Was criminal forfeiture authorized to extent entered?

(5) Was character evidence introduced in violation of Federal Rules of Evidence 401 and 404(b)?

(6) Were improper jury instructions given?

List of Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed

The caption contains the names of all the parties. No corporations are involved.

Table of Contents

Page

Questions presented i

List of Parties ii

Table of Cited Authorities iv

Order Below 1

Jurisdictional Statement 1

Constitutional Provisions and Statute Involved 1

Statement of Case 2

Reasons for Allowing Writ 5

Conclusion 19

Table of Authorities Cited

Cases — Page

Delaney v. United States, 263 U.S. 586, 590, 44 S. Ct. 206, 68 L. Ed. 462 (1924) 11

Krulewitch v. United States, 336 U.S. 440, 443-445, 69 S. Ct. 716, 718-719, 93 L. Ed. 790 (1949) 11

Lilly v. Virginia, 1999 WL373136 (U.S. Va.), ___ U.S. ___, 119 S. Ct. 1887, ___L. Ed. 2d ___ (1999) 5, 9, 11

Latwak v. United States, 344 U.S. 604, 618-619, 73 S. Ct. 481, 489-490, 97 L. Ed. 593 (1953) 11

Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) 10

United States v. Alvarez, 755 F. 2d 830 (11th Cir. 1969) 13

United States v. Benevento, 663 F. Supp. 115 (S.D. N.Y.), affirmed 836 F.2d 129 (2d Cir. 1988) (per curiam) 15

United States v. Cavale, 688 F. 2d 1106 12

United States v. Lane, 735 F. 2d 799 12

United States v. Nelson, 851 F. 2d 976 16

United States v. Scott, 413 F. 2d 932 (7th Cir. 1969) 12, 13

United States v. Velasquez, 772 F. 2d 1348 (7th Cir. 1985) 12

Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) ... 3, 5, 6, 7, 8, 9, 10, 11

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963) 11, 18

Constitutional Provisions or Statutes

Sixth Amendment to the Constitution of the United States 5, 6, 7, 8, 9, 10, 11, 12

28 U.S.C. Appendix Rules of Evidence 804(b)(3) 7, 8

Federal Rule of Criminal Procedure 8(b) 12, 13

Federal Rule of Criminal Procedure 14 13

28 U.S.C. Appendix Rules of Evidence 401 ..... 6, 16

28 U.S.C. Appendix Rule of Evidence 404(b) 6, 16, 17

21 U.S.C. § 846 2

21 U.S.C. § 841(a) 2

21 U.S.C. § 853(a) 3

Rules of the Supreme Court, Rule 10 9

Other

Constitution of the United States of America,
Analysis and Interpretation,
H. R. Doc. No. 92-82 (2d Sess. 1973) 11

Citation to Opinion Below

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below. The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix B.

Jurisdictional Statement

The United States Court of Appeals for the Seventh Circuit decided this case March 25, 1999.

A timely petition for rehearing was denied on May 18, 1999.

The time to file this petition will expire on August 16, 1999.

This Court's jurisdiction is believed to be conferred by the provisions of 28 USC §1254(1).

Constitutional Provisions and Statutes Involved

Sixth Amendment to the Constitution of the United States

28 U.S.C. Appendix Rules of Evidence 804(b)(3)

Federal Rule of Criminal Procedure 8(b)

Federal Rule of Criminal Procedure 14

28 U.S.C. Appendix Rules of Evidence 401

28 U.S.C. Appendix Rule of Evidence 404(b)

21 U.S.C.A. § 846

21 U.S.C.A. § 841(a)

21 U.S.C.A. § 853(a)

Rules of the Supreme Court, Rule 10

Statement of Case

The District Court: (1) allowed the Government to use a jailhouse informant's hearsay testimony that petitioner's co-defendants had told him petitioner was guilty; (2) allowed the Government to join petitioner's charge of conspiracy to distribute a controlled substance with charges against his co-defendants of attempted murder; (3) failed to sever petitioner from the trial of his co-defendants even though the court knew the Government would use the jailhouse informant's hearsay against petitioner; (4) allowed character evidence to be used against petitioner; and (5) forfeited petitioner's property in an amount equal to the value of methamphetamine and marijuana combined, even though petitioner's sentence was lessened to reflect that he was guilty only of marijuana distribution.

The Court of Appeals for the Seventh Circuit said all this was just fine, especially the part where the jailhouse informant testified that petitioner's co-defendants had told him that petitioner was guilty.

Petitioner, Donald English, along with John Manley, Jack Rigsby, Sr., William Randall Smith, and Raphael Zavala, stood trial on the Government's charge that they conspired to distribute illegal drugs from November 1985 to March 31, 1996. 21 U.S.C. § § 841(a) and 846.

Manley and Rigsby also were charged in the same case with the separate federal crimes of attempting to kill a government informer and using and carrying a firearm in that attempt. Petitioner neither was charged nor was involved in either of these crimes.

The Government also brought criminal forfeiture proceedings against all co-defendants. 21 U.S.C. § 853(a).

Petitioner, before trial, moved to sever his case from the others pursuant to both Federal Rules of Criminal Procedure 8(b) and 14. His motions were denied.

Before trial, Manley, Rigsby, and Zavala were held in jail, along with a Paul Oakley. Oakley was being held awaiting sentencing on an unrelated case.

Petitioner was not in jail. He was free on bond.

Petitioner, before trial, and on grounds of hearsay, moved to exclude Oakley's testimony that while he had been in jail with co-defendants Manley, Rigsby and Zavala they each separately inculpated themselves and further had told him that petitioner was involved in the alleged conspiracy. Petitioner relied on Williamson v. United States, 512 U.S. 594, 114 S .Ct. 2431, 129 L. Ed.2d 476 (1994).

The Government argued that Oakley's testimony was admissible as a penal interest exception to the hearsay rule pursuant to Federal Rule of Evidence 804(b)(3).

The District Court denied petitioner's motion, and allowed the testimony, ruling that Williamson did not preclude use of such testimony, but instead created an "inner workings of conspiracy" aid to the penal interest exception to the hearsay rule. The Seventh Circuit agreed.

Notwithstanding that the Indictment charged petitioner with a conspiracy dating from November 1985 to March 31, 1996, the District Court allowed Government witness LaDonna Duncan to testify that she had obtained marijuana

from petitioner in 1983, two years before the Government claimed the conspiracy formed. The court had denied petitioner's pretrial motion to prohibit this testimony, and at trial, overruled petitioner's relevancy objections. Petitioner then moved to strike her testimony. He lost. The court instead, during her testimony, gave an instruction to the jury that limited use of her testimony to show petitioner's "knowledge and intent."

After closing argument, the District Court, over petitioner's objection, instructed the jury that: (1) the Government had to prove a conspiracy and that petitioner knowingly and intentionally became a member; and (2) in determining whether a conspiracy existed, they were to consider the actions and statements of the alleged participants. The District Court refused petitioner's proposed instruction 10 which would have limited use of the statements made by Rigsby, Manley and Zavala to Oakley exclusively against the defendant who made each statement.

A jury convicted petitioner, and entered a finding of forfeiture. Petitioner was sentenced to 156 months imprisonment and ordered to forfeit $4,000,000.

The District Court's jurisdiction was based on 18 U.S.C. 323, 21 U.S.C. 841(a)(1) 846, 953, and 21 U.S.C. 853(p), 841(a)(1).

The jurisdiction of the United States Court of Appeals, Seventh Circuit, was based on 28 U.S.C. 1291.

Reasons for Allowing This Writ

A.

Summary

Writ of Certiorari should be granted for the following reasons:

(1) the command of Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), was not followed;

(2) the notion that Williamson has created an "inner workings of a conspiracy" aid to admission of evidence under Federal Rule of Evidence 804(b)(3) must be destroyed;

(3) it should be overtly stated that Williamson is an exercise of supervisory authority over admission of evidence in federal courts;

(4) this court needs to make clear to inferior federal courts that Williamson is a prophylactic rule fashioned to prevent federal courts from violating Sixth Amendment rights of confrontation;

(5) this case is a proper vehicle to make clear that the intention of Williamson is to preclude use in federal courts of "vicarious" admissions and confessions;

(6) alleged statements made to a jailhouse informant should be included within Williamson's sweep;

(7) in the interests of federalism, it needs to be acknowledged that the states are free to interpret their own penal interest exception to the hearsay rule so long as the Sixth Amendment is not violated; in that regard:

(a) in conjunction with Lilly v. Virginia, 1999

WL373136 (U.S. Va.) ___ U.S. ___, 119 S. Ct. 1887, ___ L. Ed. 2d ___ (1999), strengthening Williamson's federal court prophylaxis to include "vicarious" admissions and confessions of all kinds may reduce the number of cases brought to this Court from the states on claims of Sixth Amendment violations;

(8) federal courts need encouragement to exercise more supervisory authority over prosecutorial choices of joinder;

(9) the extent of joint and several liability in criminal forfeitures needs delineation;

(10) lower courts need direction with respect to proper use of Federal Rules of Evidence 401 and 404(b) in conspiracy cases;

(11) lower courts need direction with respect to proper jury instructions in conspiracy cases.

B.

Amplification of Reasons for Granting Writ

Reasons 1 through 6 - Williamson

In Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), this Court announced for federal courts the permissible scope of the penal interest exception. In that case, a Reginal Harris was stopped for a traffic violation and consented to a search of his car. Cocaine was found. The police questioned Harris. In response to their questions, he inculpated Williamson. At Williamson's trial, the district court allowed the police to testify what Harris had told them that inculpated Williamson. Since Harris was the declarant, and since Williamson, not Harris, was on trial, Harris's statement to the police was hearsay. The district

court ruled, however, that since Harris had inculpated himself as well as Williamson, the penal interest exception contained in Rule 804(b)(3) allowed admission of the testimony.

This Court disagreed, holding that out of court declarations may be admitted only if, and then only to the extent, they inculpate the declarant.

The court first construed the content of Fed. Rule Evid. 804(b)(3) as:

> Statement(s) which . . . at the time of (their) making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement(s), unless believing (them) to be true.

In that construction, this Court's first task was to declare the meaning of the word, "statement." There were two possible meanings. Under one, an entire declaration, both the self-inculpatory as well as the non-self-inculpatory parts, are admissible if in the aggregate the declaration sufficiently is self-inculpatory. Under the other meaning, only the portions of the declaration that inculpate the declarant are admissible.

This Court adopted the second, more narrow, meaning. Williamson held that only the portions of a statement that inculpate the declarant are admissible under Rule 804(b)(3); the portions that inculpate others are not admissible. 512 U.S. 594, 599.

A simple statement of the Williamson rule may be as follows: a declarant is free to waive his own penal interest, but a declarant cannot waive the penal interest of another. The error Williamson precludes is the introduction into evidence of "vicarious" admissions or confessions. Introduction of vicarious admissions of confessions necessarily always will present potential violations of the Confrontation Clause. Hence, if

they are precluded, ipso facto there can be no possibility of corresponding constitutional transgressions.

The intended purpose of Williamson was prophylactic. It was intended to interpret Federal Rule of Evidence 804(b)(3) so federal courts would be prevented from denying any defendant a Sixth Amendment right of confrontation.

"Neutral" statements, however, may be used against a non-declarant, because they do not operate as "vicarious" confessions, and do not carry the potential for constitutional error that "vicarious" confessions or admissions do, namely, denial of the right of confrontation secured by the Sixth Amendment. For example, defendant is on trial for robbery. He and the declarant are caught red-handed outside the store that was robbed, sitting with masks on in the car with the store's money pouch on the seat between them. The declarant's out-of-court statement, "I robbed the bank," may be admissible in defendant's trial. The fact that declarant's statement can be used together with the circumstances of defendant's arrest as evidence of defendant's guilt does not deny defendant any right to confront and cross-examine the declarant, because there is no "vicarious" confession.

In the case at bar, however, Williamson was not followed by two federal courts, one a trial court, the other an appellate court. Both allowed a jailhouse informant to testify to vicarious confessions, and both justified their rulings by saying Williamson created an "inner workings of conspiracy" aid to Rule 804(b)(3).

The United States Court of Appeals for the Seventh Circuit explicitly holds that Williamson does not exclude out of court statements that inculpate a non-declarant defendant so long as the trial judge: (1) independently considers each portion of the statement; and (2) for each admitted portion finds that it is sufficiently against the declarant's penal inter-

est to be admissible. The Seventh Circuit justified this approach by misusing Mr. Justice Scalia's statement in Williamson that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible co-defendant." The Seventh Circuit says they "think the statements to Oakley, which demonstrated an insider's knowledge of this drug ring, were against the declarant's penal interest, and those parts of the statements that mention (petitioner) English were admissible." Federal courts within the Seventh Circuit, thus, are free to allow the Government to use a "vicarious" confession. Although the Seventh Circuit's opinion in this case is unpublished, petitioner predicts that if this court does not correct their error, a like ruling in a later case will be published. That must be prevented. The holding of the Seventh Circuit in this case, therefore, so far departs from this Court's holding in Williamson as to call for this Court's exercise of supervisory power. The Seventh Circuit's holding is not a misapplication of a properly stated rule of law; it is, rather, a misapprehension of the proper rule of law—and one of constitutional magnitude to boot. U. S. Sup. Ct. Rule 10, 28 U.S.C.

This Court can ill afford to devise protection for the Confrontation Clause and then allow inferior federal courts to breach that protection.

This case also presents this Court with the opportunity to extend the holding of Williamson v. United States to preclude use of statements made to jailhouse informants. Petitioner has duly noted the Chief Justice's comments contained in his concurring opinion in Lilly and notes as well the pregnant implications contained in the majority opinion that indicate "special suspicion" of declarations made to police in custodial confessions. Lilly, 1999 WL37316, at page 17. Although those

comments are contained in a case arising from a state rather than a federal court, nevertheless, it is suggested that to explicitly include within Williamson's sweep a statement allegedly made to a jailhouse informant is a healthy exercise of this Court's supervisory power over admission and exclusion of evidence in federal courts. Out-of-court vicarious admissions made to jail house informers are fraught with possibilities of deceit and double-dealing by out of court declarants, and neither this deceit, nor double-dealing, nor plain self-interested lying is subject to exposure through cross-examination, if the declarant never is presented as a witness. These vicarious confessions are not the kind of statement that can be thought of as so inherently reliable as to dispense with the need for cross-examination. It is suggested that inclusion of statements made to a jailhouse informant within Williamson's scope will only enhance the healthy "bright line" intended by Williamson.

Finally on this issue, this case presents an issue of simple justice. Petitioner was convicted in violation of the rule of Williamson v. United States and he should stand on equal footing with all other defendants in the federal system, most of whom will get the benefit of Williamson v. United States.

Reason 7 –Confrontation Clause and the States

The need to clarify that relationship between hearsay and the Confrontation Clause largely grew out of state cases reviewed for constitutional violations. Before Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 923 (1965), applied the Sixth Amendment right to confront witnesses to the states, there was little need "to clarify the relationship between the right of confrontation and the hearsay rule, inasmuch as its supervisory powers over the inferior federal courts permit-

ted" this Court to control admission of hearsay. Thus, in concluding that the "co-conspirator exception to the hearsay rule is consistent with the Confrontation Clause, this Court formulated the scope of the exception pursuant to its supervisory powers." Constitution of the United States of America, Analysis and Interpretation, 92d. Congress, 2d Session, Document No. 92-82 (1973), citing Delaney v. United States, 263 U.S. 586, 590, 44 S. Ct. 206, 68 L. Ed. 462 (1924), Krulewitch v. United States, 336 U.S. 440, 443-445, 69 S .Ct. 716, 718-719, 93 L. Ed. 790 (1949), and Lutwak v. United States, 344 U.S. 604, 618-619, 73 S. Ct. 481, 489-490, 97 L. Ed. 593 (1953). *See* also, Wong Sun v. United States, 371 U.S. 471, 490, 85 S. Ct. 407, 418-419, 13 L. Ed. 2d. 923 (1963), which held that in federal cases any out-of-court declarations made after arrest may not be used against one of declarant's partners in crime as a co-conspirator exception to the hearsay rule.

The latest of those state cases is Lilly v. Virginia, 1999 WL373136 (U.S. Va.), ___ U.S. ___, 119 S. Ct. 1887, ___ L. Ed. 2d ___ (1999), in which this Court held that Virginia applied its own penal interest exception in violation of the Confrontation Clause.

In cases involving the penal interest exception that arise from the various states, therefore, the issue always will be one of constitutional magnitude. On the other hand, by interpreting the federal rules of evidence, as in Williamson, Confrontation Clause issues arising from federal courts are prevented.

The point is this: although a ruling in this case would not bind the states, a decision in this case that precludes use of vicarious admissions and confessions of all kinds can have two healthy effects on the states: (1) on the one hand, such a decision may discourage state courts from excluding evidence that is proper under the Confrontation Clause, for example, the kinds of statements that are exemplified by Justice

O'Conner in Part IIB of the opinion in Williamson, while on the other hand; (2) discourage state courts from admitting evidence that has the potential to violate the Confrontation Clause. Thus, not only would the states be encouraged toward proper application of the rules of evidence, but also one might reasonably expect a decline in Confrontation Clause cases coming to this Court from the states.

Reason 8 – Joinder and Severance

Courts exercise only the most cursory oversight over prosecutorial choices in joinder. This case presents this Court with the opportunity to clarify the meaning of the phrase, "same series of acts or transactions" and prevent further misjoinders by the Government.

The Indictment, on its face, establishes misjoinder. Rule 8(b), Federal Rules of Criminal Procedure, allows two or more defendants to be charged in the same Indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b).

The question under Rule 8(b), therefore, is whether the acts charged in all Counts are the same "series of acts or transactions." If they are not, there is misjoinder and the question of prejudice is not reached. United States v. Velasquez, 772 F.2d 1348 (7th Cir. 1985).

The phrase "same series of acts or transactions" means "acts or transactions" that are pursuant to a common plan or common scheme. United States v. Valasquez, citing United States v. Cavale, 688 F. 2d at 1106; United States v. Scott, 413 F. 2d 932, 935 (7th Cir. 1969); United States v. Lane, 735 F. 2d 799, 805. (5th Cir. 1984). Ordinarily, issues of common plan or "same series of acts or transactions" examines whether the

transactions have occurred in the same place, within a short period of time, and using the same *modus operandi*. United States v. Scott, 413 F. 2d 932 (7th Cir. 1969). None of those factors are present in the Indictment in this case.

The Government did not indict petitioner with attempting or conspiring to kill the Government's informant witness, yet joined him in the conspiracy charge not only with those who did, but then joined the charges of attempt murder and the firearms charges against Manley and Rigsby with the conspiracy charge. The Government did not indict petitioner with attempted murder and carrying a firearm, because the Government knew he was not liable. The Government knew he was not liable, because he was not involved. If the Government had believed that the attempt murder and the firearms charges were part of the same "series of acts or transactions" stated in the charge against petitioner, the Government also would have included petitioner in the attempt murder charge and firearms charge, because the act of one co-conspirator is the act of all and all are liable. *See*, e.g., United States v. Alvarez, 755 F. 2d 830 (11th Cir. 1985). Therefore, since petitioner was not charged with the attempt murder or carrying a firearm, the Government tacitly concedes that Counts 2 through 7 are not part of the "same series of acts or transactions" alleged in Count I. The Government, thus, tacitly concedes misjoinder. This Court needs to encourage federal courts to exercise oversight over these kinds of prosecutorial charges to prevent error.

In the unlikely event joinder initially was proper under Rule 8(b), nevertheless, Rule 14 called for severance.

In conspiracy cases, there is an inclination to admit evidence that otherwise would be excluded. Joint trials exacerbate that tendency.

In this instance it would have been unlikely that the jury could avoid taking the evidence relevant only to Rigsby and Manley, murder and firearms, and using it to bolster the strength of the evidence of conspiracy presented against petitioner.

The Government's case against petitioner consisted of a note written by petitioner, some telephone records, some lack of tax filings, and a co-conspirator. Had petitioner's case been severed, the jury could have boiled the case down to whether they believed the co-conspirator, a person who had made a deal with the Government. Since petitioner was not severed, however, the jury heard all the testimony from all other witnesses, whether their testimony related to petitioner or not, and saw physical evidence that related only to the other defendants, not the least of which was Government's Exhibit #110A, a transcript of a 911 tape.

The tape was a recording of a call made by the co-conspirator to 911 to report that he had been shot by Manley and Rigsby.

This evidence was relevant only to the attempt murder and the firearms charges. It condemned Rigsby, condemned Manley, but had no substantive effect on petitioner; he was not involved in the shooting. Nevertheless, both tape and transcript could be used by the jury to corroborate this witness. The jury, logically could say, "Well, we had doubts until then, but that tape sure told the story—he's telling the truth and since he told the truth about Manley and Rigsby shooting him, he's telling the truth about petitioner."

The legal truth, however, is that had the misjoinder under Rule 8 been recognized and the case severed, neither tape nor transcript would have been admitted in petitioner's trial. The refusal to sever allowed the Government to bolster the credibility of the only real witness against petitioner by means that

otherwise would have been impossible.

This Court needs to address the growing and understandable, tactical preference of prosecutors for joint trials of defendants charged with conspiracy.

Reason 9 – Forfeiture

The district court found petitioner jointly and severally liable with the others, and submitted the forfeiture to the jury who found English liable for $4,000,000.00, citing United States v. Benevento), 663 F. Supp. 115, 118-9 (S.D. N.Y. 1987), aff'd 836 F. 2d 129 (2d Cir.1988) (per curium). That case is not precedent for this case. In Benevento, it was clear that all co-defendants were responsible for the conduct of all the others. Benevento is a straightforward joint and several liability case.

Petitioner concedes he is liable jointly and severally with those with whom he was indicted if found guilty. His claim is not that he was made "too jointly and severally liable." His claim instead is that he cannot be liable, either singly, or jointly and severally, beyond the extent the evidence proved his involvement.

In this case, the Government's evidence as to petitioner only supports one of the dual purposes of the conspiracy—marijuana—and does not support the other—methamphetamine. Further, even by the Government's version of the evidence, petitioner quit the conspiracy in August of 1994. These factors led the district court to impose sentence only to the extent of English's own responsibility in accordance with the Sentencing Act,—i.e. marijuana. The district court in contrast, however, imposed judgment in forfeiture beyond petitioner's responsibility,—i.e. both marijuana and methamphetamine.

If the purpose of the criminal forfeiture statute is punishment and the judgment is *in personum* rather than *in rem*, United States v. Nelson, 851 F. 2d 976, 981 (7th Cir. 1988), it likewise should follow that petitioner should not be exposed to an *in personum* judgment beyond the conspiracy with which the court and jury believed he was involved. Petitioner should not have been held jointly liable to an extent greater than that to which he could be exposed under the Sentencing Act. Forfeiture, therfore, should have been limited to the value of the marijuana.

This Court needs to announce a definitive statement of the extent of exposure in joint cases for forfeiture.

Reason 10 – Character Evidence

The Government called Ladonna Duncan to testify she obtained marijuana from petitioner on several occasions in 1983. That is irrelevant, because these occasions predate the conspiracy charged. Thus, this testimony does not make a fact of consequence more or less probable. Fed. Rule Evid. 401.

The District Court admitted this evidence for the limited purpose of showing "knowledge" and "intent." Since the conspiracy had not yet formed, petitioner could not have knowledge of something that had yet to occur. Duncan's testimony, therefore, could not make his knowledge of this conspiracy either more or less probable.

The same argument applies to "intent." The essence of conspiracy is an agreement. Duncan's testimony cannot suggest petitioner intended to make an illegal agreement, because the alleged events occurred two years before the alleged agreement was made.

The limiting instruction made worse the mischief.

The limiting instruction told the jury that if they believed

Duncan, they could use her evidence that she got marijuana from petitioner several years before a conspiracy existed to infer that petitioner knew of the conspiracy and intended to join it, and thus could infer that he was guilty as charged.

Thus, the only purpose of her testimony was to prove character, in violation of Rule 404(b).

Reason 11 – Jury Instructions

The jury was not instructed properly. At the least, the jury should have been instructed to limit use of a defendant's statement to the defendant who made it. Petitioner made this request. The court refused. It will be recalled that earlier, the court had allowed Paul Oakley to testify that Rigsby, Smith and Zavala had told him that petitioner was guilty. If it was error to admit this evidence, it likewise was error in refusing this instruction.

The instructions acted in combination with the limiting instruction as to Ladonna Duncan's testimony to advise the jury that they could convict petitioner on non-substantive evidence.

The instructions told the jury that knowledge was an element of the crime charged, and that knowledge meant petitioner realized what he was doing. The jury, therefore, could take all this to mean that if petitioner knew he was dealing marijuana to Duncan in 1983, then petitioner acted "knowingly" to conspire to . . . distribute . . . marijuana . . . ."

The jury then further could find that since petitioner knowingly distributed marijuana to Duncan, he intended to join the conspiracy. Government's instruction 11 informed the jury that the Indictment charged a conspiracy from November 1985 until about March 31, 1996, but further told them that the evidence need only establish that the offense was

committed on a date reasonably near to the date charged. Since the instruction did not say one way or the other, the jury could believe that 1983 was close enough to November 1985 for English to be guilty. The court, thus, told the jury that they could use a two year old bad act from which to infer English's knowledge of a conspiracy that had not yet been formed and to infer his intent to join what had not been formed. Finally, Government's instruction 8 finished the job. That instruction told the jury that in determining whether petitioner was a member of the conspiracy they might consider:

(1) evidence of his conduct; and

(2) the evidence of what other co-conspirators had said "during the course of and in furtherance of" the conspiracy.

As to the latter point, the jury would not have known that Oakley's hearsay testimony that co-conspirators told him that petitioner was guilty was admitted under the "penal interest" exception instead of "during the course of conspiracy" exception. Wong Sun, 371 U.S. 471, would have excluded that testimony if offered under the "during the course" of conspiracy exception. Therefore, the jury could have believed, and most likely did believe, that what Rigsby, Manley, and Zavala had told Oakley was told "in the course of and in furtherance of the conspiracy."

The jury, therefore, was instructed that they could find petitioner guilty because of: (1) his conduct (before the conspiracy began, he had delivered marijuana to Duncan); and (2) what co-conspirators said (Oakley swore that the others had told him that petitioner was guilty). The evidence that had been erroneously admitted, therefore, operated in tandem with the improper instructions to allow the jury to convict petitioner, even if they disbelieved all the evidence that had been properly admitted against him. The jury might not have

believed the co-conspirator, and attached little weight to the other evidence, namely: the note, the telephone records and the lack of some tax filings. Yet, as instructed, Duncan's testimony and Oakley's testimony both were inadmissable. Thus, petitioner's conviction may rest entirely on inadmissable evidence, and therefore, must be reversed.

This Court should address this problem in light of a growing tendency to bring conspiracy charges in preference to charges of choate offenses.

Conclusion

Petitioner requests this Court to grant his Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO
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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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4 pp

TABLE OF CONTENTS

Page No.

Appendix A - Judgment - With Oral Argument 1

Appendix B - Order Affirming Judgments of District Court 2

Appendix C - Judgment in a Criminal Case 9

Appendix D - Excerpts from Volume 1 of Transcript of Record 11

Appendix E - Excerpts from Volume 5 of Transcript of Record 18

Appendix F - Excerpts from Volume 3 of Transcript of Record 22

Appendix G - Excerpts from Testimony of Ladonna Duncan 25

Appendix H - Order Denying Motion for Rehearing En Banc 30

Appendix I - Constitution Provisions & Statutes Involved 31

Appendix J - Second Superseding Indictment 34

Appendix K - Defendant English's Instruction No. 10 38

Appendix L - Government's Suggested Jury Instruction No. 3 39

Appendix M - Extension of Time to File Petition for Writ of Certiorari 40

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 25, 1999

BEFORE: Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

Nos. 97-2837, 97-2839, 97-3570, 97-4088 & 98-1101

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

WILLIAM R. SMITH, RAPHAEL M. ZAVALA, JOHN MANLEY, DONALD ENGLISH, and JACK RIGSBY, SR.,
Defendants-Appellants

Appeals from the United States District Court for the Southern District of Illinois, Benton Division
No. 97 CR 40031, J. Phil Gilbert, Chief Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

"Appendix A"

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued October 26, 1998
Decided March 25, 1999

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. Frank H. Easterbrook, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Nos. 97-2837, 97-2839, 97-3570, 97-4088, 98-1101

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United StatesDistrict Court for the Southern District of Illinois.
v.	
WILLIAM R. SMITH, RAPHAEL M. ZAVALA, JOHN MANLEY, DONALD ENGLISH, and **JACK RIGSBY, SR.,** *Defendants-Appellants*	No. 96-CR-40031-JPG **J. Phil Gilbert,** Chief Judge

ORDER

The indictment in this case charged the five defendants on appeal (and others who are not contesting their convictions) with being members of a major drug distribution conspiracy.

"Appendix B"

Two of the defendants—John "Jay" Manley and Jack Rigsby, Sr.—were also charged with various offenses stemming from the shooting of a government witness. The five were convicted following a jury trial. Manley and Rigsby received huge sentences—353 months and a life term, respectively. The other three—Raphael Zavala, William Smith, and Donald "Pepper" English—received lesser terms of between 150 and 156 months. Because the jury convicted the defendants, we set out a few facts in the light most favorable to the government.

The first count of the indictment alleged a conspiracy to distribute marijuana and methamphetamine. The conspiracy allegedly ran from 1985 through March 31, 1996. The most crucial event during that time occurred on October 24, 1994, when, on an isolated stretch of road in rural southern Illinois, a drug dealer named Steven Brenningmeyer was shot and left for dead. Brenningmeyer had been arrested the week before and agreed to cooperate with investigating state and federal agents. He was shot while he was going to a meeting with the law enforcement agents. Despite extensive internal injuries, Brenningmeyer lived and eventually testified that Manley shot him at the urging of Rigsby. A few more details on the shooting will come a little later.

In the mid-1980's Rigsby was a relatively small-time marijuana and cocaine dealer working out of Massac County in southern Illinois across the Ohio River from Paducah, Kentucky. He had drug dealings with "Jay" Manley at that time. Eventually Rigsby graduated into selling larger amounts of drugs.

Manley's drug fortunes were rising at the same time as Rigsby's. Manley had developed "Pepper" English as a source for marijuana. English obtained his weed from a fellow named Ricky Burrus in the late 1980's. Burrus was getting his marijuana from Zavala, who lived in Texas. In 1991 Burrus "ripped off" Zavala so English developed a direct pipeline to Zavala. English then recruited Brenningmeyer to help him run drugs from Texas. Brenningmeyer made several trips to the Lone Star State on English's behalf. At one point English said that Manley was receiving almost all of the marijuana he obtained from Texas.

Manley's drug trade was prospering—to the point where he was also providing drugs to Rigsby.

By August of 1994 English was ready to "retire" from the drug business. He approached Manley and offered to "sell" him Zavala and Brenningmeyer. Under the Manley/English agreement, Brenningmeyer would continue to make trips to Texas and obtain marijuana from Zavala. For each trip Brenningmeyer took for Manley, English was to receive $4,000. At the time of his "retirement," English estimated he had obtained over 2,000 pounds of marijuana from Zavala. Brenningmeyer continued to make trips for Manley, transporting some 300 pounds from August of 1994 until he was arrested in mid-October, 1994.

Meanwhile, Rigsby had developed a source for drugs in Arizona. Besides receiving the bulk of Manley's marijuana, Rigsby was also receiving huge amounts of marijuana and methamphetamine from Theodore "Preacher Ted" Burkey. Airplanes and automobiles were used to transport the drugs to Rigsby.

Rigsby's drug operation began to come unglued on October 19, 1994, when Brenningmeyer was arrested during a sting operation. Demonstrating once again the lack of honor among criminals, he had been set up by a fellow drug dealer named Steve Otis. Brenningmeyer, in turn, sang to the arresting agents.

On October 24 Brenningmeyer told Otis he was going to meet with law enforcement agents later that day. Brenningmeyer later left his job (where he employed Otis) and began his journey to his meeting with the police. He never made it. As Brenningmeyer approached a small bridge he was flagged down by a man dressed "like a cowboy." The "cowboy" walked around Brenningmeyer's truck and Brenningmeyer realized it was Manley. Manley told Brenningmeyer, "I hear you've been running your mouth. We already know the story. You're going to meet with them." Manley then told Brenningmeyer, "You know what the consequences are" and pulled a handgun out of his coat. Brenningmeyer than (sic) saw Rigsby running toward him, screaming "Do it. Do it. Do it now." Manley pulled the trigger but missed, as Brenningmeyer started running. The next thing

Brenningmeyer knew, another shot was fired and he was "burning up." The second shot had found its mark. Manley and Rigsby took off, but Brenningmeyer didn't die. He struggled back to his truck and called 911 on his cell phone. Paramedics eventually arrived and saved his life.

Quite understandably, English, Smith, and Zavala wanted to put as much distance between themselves and Manley and Rigsby as possible. They argued that charges stemming from the attempt to murder Brenningmeyer could not be joined with the conspiracy charges against them. But under Rule 8(b) of the Federal Rules of Criminal Procedure, defendants may be tried together if their charged conduct arose from the "same act or transaction or same series of acts or transactions." And here, all the allegations grow out of the same drug dealing conspiracy. The joinder, therefore, of the defendants and the counts under Rule 8(b) was not improper. The closer issue, but only in a relative sense, is whether Smith, Zavala, and English were entitled to severance from Manley and Rigsby under Rule 14 of the Federal Rules of Criminal Procedure.

Under Rule 14, properly joined defendants and counts, like the ones we are dealing with here, should be severed if there is a serious risk that a joint trial will compromise the rights of any defendant to a fair trial. The district judge denied the severance motion, and his decision in that regard may only be overturned if it is clearly shown that he abused his discretion. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997).

For many years we have embraced a strong presumption in favor of conducting joint trials for persons indicted together, especially where the indictment charges a conspiracy. See United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965). Neither English, Smith, nor Zavala point to any specific right that they have been deprived of by being tried together with Manley and Rigsby. It is true that, if the government's evidence was accepted, the jury would probably conclude that Manley and Rigsby were more serious criminals, but that does not mean that the jury would feel compelled to convict lesser players despite a dearth of evidence against them. In fact, it can just as logically be argued

that having more culpable actors in a joint trial inures to the benefit of lesser players, who can argue that their minimal involvement, which pales by comparison, should earn them a pass from the jury. All that said, we do not find any legal error in joining the counts in this indictment, nor do we conclude that the district judge abused his discretion in not separating Smith, English, and Zavala from Manley and Rigsby.

Recall that we noted the fact that Brenningmeyer called 911 on his cell phone to report the shooting. A tape was made of this call, and its use during the trial is another issue raised by all five defendants. In the recorded call, Brenningmeyer reported that Manley and Rigsby were the assailants.

Brenningmeyer, after he was shot, gave conflicting statements to the police about who had tried to kill him, blaming the deed first on some "Mexicans." Naturally the defense tried to capitalize on these lies by casting doubt on Brenningmeyer's fingering, during the trial, of Manley as the gunman and Rigsby as the one urging him on. Thus, we think, it was perfectly proper for the trial judge to allow the tape in evidence, as it helped rebut the planted seed of fabrication. Additionally, Rigsby and Manley repeat a number of claims made in the district court about poor sound quality and other technical objections to the admissibility of the tape. These objections, of course, were denied by the district court, and upon our review of the record we fail to see why that decision could be viewed as an abuse of discretion by the judge.

It should be noted that English, Zavala, and Smith also argue about the admissibility of the 911 tape; however, the tape was admissible only against Rigsby and Manley for their role in attempting to kill Brenningmeyer. To underscore this point the district court gave repeated admonitions throughout the trial that the evidence relating to the shooting pertained only to Rigsby and Manley.

Other evidentiary errors, but not all that many considering the number of defendants and counts, are alleged in addition to the matter of the 911 tape. Principally, Mr. English argues that

the district judge erred in allowing Paul Oakley to testify regarding jailhouse conversations he had with Rigsby, Smith, and Zavala. English also argues that the district judge should have excluded the testimony of Ladonna Duncan.

A trial judge has broad discretion to determine the admissibility of evidence, and his calls will be reversed on appeal only upon a clear showing of an abuse of discretion. United States v. Hattaway, 740 F.2d 1419, 1424 (7th Cir. 1984). This, of course, presents a huge impediment to those relying on evidentiary errors for their salvation.

Rigsby, Smith, and Zavala confided in Oakley when all of them were locked up together in the Franklin County Jail awaiting trial. Each in turn told Oakley they were in the drug business with English. Under the circumstances, Oakley could relate these remarks to the jury (note that no argument is made that the admission of Oakley's testimony violated the rule of Bruton v. United States, 391 U.S. 123 (1968)) because they were against their maker's penal interests under Rule 804(b)(3) of the Federal Rules of Evidence as interpreted by Williamson v. United States, 512 U.S. 594 (1994).

What is required after Williamson is not that inculpatory statements like those made to Oakley be excluded, rather, what is required is that the trial judge independently consider each portion of the statement and for each admitted portion find that it is sufficiently against the declarant's penal interest to be admissible under Rule 804(b)(3) and the Confrontation Clause. Williamson, 512 U.S. at 606 (Scalia, J., concurring) ("[A] declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant."); see also United States v. York, 933 F.2d 1343, 1361 (7th Cir. 1991) ("There is little question that the drafters of the Rules of Evidence and Congress intended Rule 804(b)(3) to permit admission of inculpatory statements where consistent with the confrontation clause of the sixth amendment.").

Thus, according to Williamson, "The question under Rule 804(b)(3) is still whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'" Williamson at 603-04. We think the statements to Oakley, which demonstrate an insider's knowledge of this drug ring, were against the declarants' penal interest, and those parts of the statements that mention English were admissible.

English also argues that the district court abused its discretion when it allowed Ladonna Duncan to testify that she had purchased marijuana from English 2 years before the start of the charged conspiracy. That testimony was probably admissible under Fed. R. Evid. 404(b), but even if it was not, its admission could not, on this record, be seen as anything more than harmless error.

We have not discussed all the issues raised by the defendants. The ones left untouched—for instance, Rigsby and Manley challenge the sufficiency of evidence against them, arguing that Brenningmeyer was not a credible witness—are without merit. Accordingly, the judgments as to each defendant are affirmed.

UNITED STATES DISTRICT COURT
Southern District of Illinois at Benton

UNITED STATES OF AMERICA

v.

DONALD "PEPPER" ENGLISH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number:
4:96CR40031-003

Robert Howerton
Defendant's Attorney

THE DEFENDANT:

* * *

was found guilty on count(s) **1 of the Second Superseding Indictment,** after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
21 U.S.C. § 846	Conspiracy to Distribute Marihuana and Methamphetamine	03/31/1996	1

* * *

12/03/1997
Date of imposition of Judgment

/S/ J. Phil Gilbert
Signature of Judicial Officer

J. PHIL GILBERT
CHIEF JUDGE
Name & Title of Judicial Officer

12-19-97
Date

"Appendix C"

DEFENDANT: **DONALD "PEPPER" ENGLISH**
CASE NUMBER: **4:96CR40031-003**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **156 month(s)**.

156 on Count I of the Second Superseding Indictment.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 96-40031
	)	
Plaintiff,	)	Benton, Illinois
	)	December 3, 1996
vs.	)	
	)	FILED
RANDALL SMITH, DONALD	)	97MAY13 AM10:36
ENGLISH, JOHN MANLEY, JACK	)	CLERK
RIGSBY, and RAPHAEL	)	U. S. DISTRICT
MARTINEZ ZAVALA,	)	COURT
	)	SOUTHERN
Defendants.	)	DISTRICT IL
	)	BENTON OFFICE

Volume 1

BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT CHIEF JUDGE,
and a jury.

APPEARANCES:

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THE COURT: We're on the record in United States of America versus Randall Smith, et al. Let the record show that all the defendants are present with their respective counsel. Government counsel is present. It's bright and early in the morning. We're going to go through some pending motions before the jury comes in. We start with the opening statements.

The first motion I want to take up is the motion regarding the proffered testimony of Paul Oakley, the jailhouse informant. In order that we make sure that we know who is – this motion was actually initiated by the government. Mr. English, his attorney, Mr. Howerton, has filed a motion regarding that testimony, proposed testimony, and I think, Mr. Stobbs, you have joined in on that motion?

MR. STOBBS: Yes, sir, that's correct.

THE COURT: Have any other defendants joined in that motion for the record?

MS. PHILLIPS: For the record, I would so move at this time.

MR. LOCKWOOD: I would join the motion. I think Howerton is right.

MR. MAURIZIO: I had filed a written motion adopting Mr. Howerton's motion.

* * *

MR. LEGGANS: Your Honor, I think at the outset it is important to note that there are really two classes of statements, and I think Mr. Howerton touched on this. The first class of statements are statements which the declarants made which implicate only themselves, and I don't think there's any doubt or any argument before this Court that those should be excluded.

I think the battleground here is over whether or not this Court should admit the declarations of these defendants which not only inculpate themselves, but also inculpate others. I

believe the law is fairly clear that the statement against penal interest is an exception to the hearsay rule, but is also co-extensive with the defendant's confrontation clause rights. Therefore, if a statement is admissible as a statement against penal interest, there's no confrontation class (sic) problem and there's no Bruton problem.

That brings us to the issue whether these statements we seek to admit fit within the statement of the penal interest question. It is our argument that they do. Mr. Howerton's argument appears to be that if a declarant, the only statements that are admissible against a declarant under the penal interest exception are only those statements which inculpate only the defendant.

I believe the case law in Williamson gives support to the argument that a defendant can make statements that fit within the 804(b)(3) exception which not only inculpates himself, but also inculpates others, and it doesn't change the calculus that those statements are still against the penal interest of the declarant.

That is particularly true in this case where you have defendants who are charged with joint ventures, who at the time of the making of the statement are aware that they are charged with the joint venture and are nevertheless making statements which implicate themselves in those joint ventures. So upon that basis, Your Honor, I would move the Court to admit all of the statements contained in the government's second offer of proof and allow Mr. Oakley to testify to the full extent what he was told by the defendants in this case.

THE COURT: Okay. The Court has spent a lot of time reading and reviewing this issue and wants to at the outset, in order to make the record clear, state that these were statements that were given by the defendants to a fellow inmate that was incarcerated with them, a little bit different situation than some of the other cases I've read where statements were given to police officers. And from that standpoint, the Court is taking, at least initially, a painting a broad picture that statements that are made in a situation such as this probably, in which there is no reason for the defendants to be currying favoring with Oakley or any other jailhouse, what turns out to be a jailhouse informant, that there are some elements of

credibility and truthfulness to statements that are made to fellow inmates under situations like this, unlike statements that could be made to police officers in which it's clear that many times declarants are trying to curry favor with the police officer in order to feather their own nest and reduce their exposure. You don't have that type of impetus to lie in situations such as this.

In reading Williamson, and I think the Court has stated in previous hearings regarding this issue, I think Williamson does necessitate the Court go through a step-by-step procedure in determining whether various statements would or would not be admissible under the exception, penal interest exception. The Court does not read Williamson as narrowly as I think Mr. Howerton wants the Court to interpret it. I will say that can put district judges and probably court of appeal judges in sometimes a guessing game when you have a Supreme Court where one person writes an opinion, and then you have two or three concurring opinions, and some of the concurring opinions don't actually fit like a glove with the author of the original opinion. And, you know, we all know that sometimes there are Supreme Court decisions in which decisions are made, and there is no so-called majority opinion.

I, in reading Williamson, I do not think in a situation – and the facts in Williamson, the situation in Williamson is different from what we have here. And I don't think Williamson would exclude every statement in which a declarant inculpates not only himself and another person. I do believe Williamson does restrict some of those admissions, but I don't think it eliminates them. What I'm going to do is go through, starting at the bottom of page 6 if everyone can get there, and go through each statement that I have numbered that, in my opinion, the government wishes to get through and get in with Oakley.

The first statement I have is that Rigsby and Oakley, "Rigsby told Oakley that he and Manley had discovered that Brenningmeyer was a police informant and decided that he had to be killed if they were going to 'save their asses.'" Is that the statement, Mr. Leggans?

MR. LEGGANS: Yes, Your Honor.

THE COURT: Okay. The Court is going to – again, Mr. Leggans, my rulings are premised on the fact that if Oakley

testifies, that the proper foundation for the admission of these statements are laid by you before these questions are asked. You understand what I mean about the situation about how these statements came to arise?

MR. LEGGANS: Your Honor, I had planned to go through the setting that the statements were given and that sort of thing if that's what you're talking about.

THE COURT: Yes. The Court is going to admit that statement or allow that statement to be testified about, assuming proper foundation, on the basis that this statement inculpates not only – inculpates Rigsby as well as Manley. So inculpates the declarant in a criminal as a penal interest as well as Manley. And the second statement, "Rigsby also stated that he was going to be Manley's alibi and vice versa." The Court, for like reasons, is going to allow that statement to be admitted.

The third statement that I have, "Rigsby also stated that he got his marijuana from Jay Manley who in turn obtained it from Raphael Zavala." In the opinion of this Court, this goes to the inner workings of the conspiracy. There is a conspiracy charged here. I do not believe Williamson automatically excludes these types of statements. Again, Rigsby is inculpating himself as well as others in that statement.

The fourth statement I have, "Rigsby revealed that the defendant, Donald 'Pepper' English, was the person who was originally responsible for obtaining marijuana from Zavala. English eventually however, ceded control of the operation though (sic) Manley." The Court disagrees with Mr. Howerton that the offer of proof is inadequate as a matter of law. Again, assuming the proper foundation is laid, the Court believes that this goes to the inner workings of the conspiracy. Rigsby is inculpating himself as well as English in those statements.

Those are the only statements that I have listed from the offer of proof through Rigsby inculpating others.

Turning to page 8, we have statements by Smith implicating himself and others. One, "Smith admitted that he had been part of an organization that had been distributing drugs for more than ten years." I don't see how that implicates others. It implicates himself. That's a statement against his penal interest. That statement, standing alone, doesn't impli-

cate anybody else.

So I go to the next one, "That group of people included Jack Rigsby, John 'Jay' Manley, Steve Brenningmeyer, Raphael Zavala, Donald English and others." Again, the Court believes that that would show the inner workings of the conspiracy, and the Court's going to allow that statement to be made.

The third statement, "Smith revealed that Manley and Rigsby were the 'bosses' and that they were present whenever money was involved." The Court does not believe that that meets the test of Williamson. That does not inculpate Smith. In fact, Smith there is kind of exculpating himself from some of the higher, the hierarchy of the conspiracy, and the Court's going to disallow that testimony.

The fourth, "Smith also revealed that the people in the organization did not work, but owned houses, farms, cars, tractors, trucks, airplanes and more." The Court's going to not allow that statement. Does not feel that that meets the test of Williamson.

Fifth, "Smith further states that he and other co-defendants had legitimate looking jobs that were just 'covers' so that they could explain the money they derived from illegal drug activities." That implicates Smith as well as others, and the Court's going to allow that statement.

Sixth, "Smith also discussed with Rigsby, in Oakley's presence, the fact that their crystal methamphetamine had been coming from Arizona." The Court's going to allow that, again, showing the inner workings of the conspiracy. "They also discussed the fact that they had one or three airplanes that were used to sell drugs in Southern Illinois and Kentucky." The Court feels that also shows the inner workings of the conspiracy and implicates the declarant as well as the third party.

Eight, "Like Rigsby, Smith also claims that Donald 'Pepper' English was the person who was originally responsible for obtaining marijuana from Zavala." My ruling there is the same with Rigsby. I feel that inculpates Smith as well as English, and therefore, that is admissible.

"Also English eventually, however, ceded control of the operation to Manley." That, too, for the same reason will be

allowed to testify.

Statements by Zavala implicating himself and others. Zavala, first question, the first statement. "Zavala admitted he had distributed large amounts of marijuana from Texas through John Manley." Again, that shows inner workings of the conspiracy, and the Court's going to allow that.

Two, "Zavala never dealt directly with Jack Rigsby, but he knew that Rigsby was contributing a large percentage of money that the organization used to buy illegal drugs from him." The Court's going to disallow that statement. It appears from that, that that's hearsay on top of hearsay. And the Court does not feel that would fit in with any exception to the hearsay rule. Those are the only statements of Zavala.

Statements of John Manley. One, "Manley told Oakley 'he had better keep his mouth shut about everything.'" And two, "Manley also told Oakley to go tell Smith and others to 'keep quiet' as well." The Court's going to disallow those statements, finding that they – I don't know – at best this could be argued that this is part of a coverup of a conspiracy, but this is statements that did not go on during – I mean I really don't know what he – these statements standing alone don't, to me, are not probative of and do not and would not in my opinion meet the test of Williamson. So the Court's going to disallow the statements of John Manley.

That's the ruling of the Court. The Court will show every defendant objecting to the Court's ruling, and the government may be objecting to the Court's ruling on the ones I've disallowed. I've made my decision. I hope you're not going to argue what I've just ruled.

MR. HOWERTON: Judge, we had a little problem yesterday when I was trying to make a record. I advised the Court that the law requires me to object each and every time these statements are sought to be admitted.

THE COURT: The Court will note a continuing objection by each defense counsel when the statements are made.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 96-40031
	)	
Plaintiff,	)	Benton, Illinois
	)	December 11, 1996
vs.	)	
	)	FILED
RANDALL SMITH, DONALD	)	97MAY13 AM10:37
ENGLISH, JOHN MANLEY, JACK	)	CLERK
RIGSBY, and RAPHAEL	)	U. S. DISTRICT
MARTINEZ ZAVALA,	)	COURT
	)	SOUTHERN
Defendants.	)	DISTRICT IL
	)	BENTON OFFICE

Volume 5
BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT CHIEF JUDGE,
and a jury.

APPEARANCES:

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"Appendix E"

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MR. LEGGANS: Okay.

MR. STOBBS: The objection we had made before, that's continuing throughout this testimony?

THE COURT: Yes.

(The sidebar conference concluded.)

PAUL OAKLEY,

having been first duly sworn, testified as follows:

THE CLERK: Would you be seated, please. State your full name for the record and spell your last name.

THE WITNESS: Paul Oakley, O-A-K-L-E-Y.

DIRECT EXAMINATION

BY MR. LEGGANS:

Q. Mr. Oakley, are you currently incarcerated?

A. Yes, I am.

Q. What are you incarcerated for?

A. Conspiracy, methamphetamine.

Q. Is that conspiracy to sell methamphetamine?

A. Yes, sir, it is.

Q. And is your incarceration the result of a plea agreement?

A. Yes, it is.

Q. I'm handing you what has been marked Government's Exhibit 81, and I'll ask you if you can identify that document?

A. Yes, sir, this is my plea agreement.

Q. Is that – do you recognize that as something you signed?

A. Yes, sir.

MR. LEGGANS: Your Honor, I offer Government's Exhibit 81.

THE COURT: Any objection? Be admitted.

Q. (by Mr. Leggans) During the course of your incarceration, have you been incarcerated with any of the individuals, with any of the individuals in court today?

A. Yes.

Q. Who have you been incarcerated with?

A. Jack Rigsby, William Smith, Raphael Zavala.
Q. And where were you incarcerated when you were with those individuals?
A. Franklin County.
Q. During the time that you were incarcerated with those individuals, did they make statements to you regarding their past criminal activities?
A. Yes, they have.
Q. And who made those statements to you?
A. All three of them have.
Q. Who was present when these statements were made?
A. Different people at different times.
Q. And when did these statements occur?
A. During our incarceration at Franklin County.
Q. And when did you first get to Franklin County?
A. January of '96.
Q. And then were you eventually transferred out of

* * *

A. Basically, he was just someone once the drugs had arrived, he set up deals.
Q. What do you mean by setting by deals?
A. Well, he would meet with the individuals on basically distributing it.
Q. Did he tell you how long he had been involved in the organization?
A. Ten years or better.
Q. Did William Randall Smith tell you who else was involved in the organization?

MR. HOWERTON: Object, hearsay.

THE COURT: Overruled.

THE WITNESS: Yes. To begin with, Brenningmeyer and a Pepper English was supposed to have been involved, and then English had quit, but there was also Zavala, Rigsby, Manley. I believe that was the ones that I had been told about.
Q. (by Mr. Leggans) Now had Jack Rigsby told you who had been involved in the organization, also?
A. Who had been involved in it?
Q. Yes. Did Jack Rigsby make any statements regarding who was involved?
A. In the –

MR. HOWERTON: Objection, hearsay.

THE COURT: Overruled.

MR. LOCKWOOD: I believe it's been asked and answered.

MR. LEGGANS: I don't believe I asked him if Rigsby made the same statement.

THE COURT: I agree. Overruled.

Q. (by Mr. Leggans) Did Jack Rigsby make any statements who was involved in the organization?

A. Yes, he did.

Q. What did Jack Rigsby tell you?

A. Pepper English, Brenningmeyer, Smith, Zavala, and there was one from Arizona, but I can't remember his name.

Q. Now getting back to William Randall Smith, did William Randall Smith tell you how they got started in the business?

A. Well, basically, what he had said was that they got started through Pepper English and Brenningmeyer.

MR. HOWERTON: May I show a continuing objection?

THE COURT: Yes.

Q. (by Mr. Leggans) And what was it that William Randall Smith told you that the group was dealing?

A. Marijuana and methamphetamine.

Q. And where did he tell you the marijuana was coming from?

A. From Jay Manley.

Q. And where was the methamphetamine coming from?

A. From the individual from Arizona.

Q. Did you have any conversations with an individual named Raphel Zavala?

A. Yes.

Q. And what did Raphael Zavala tell you about his role?

A. Well, he was the main one that, one of the main ones that the pot was coming to Manley from, from Texas.

Q. And did he say whether he dealt with anyone besides Jay Manley?

A. There was others before Pepper English and Brenningmeyer. And I can't—there was supposed to have been one in Arizona, but like I say, I can't remember.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 96-40031
	)	
Plaintiff,	)	Benton, Illinois
	)	December 5, 1996
vs.	)	
	)	FILED
RANDALL SMITH, DONALD	)	97MAY13 AM10:37
ENGLISH, JOHN MANLEY, JACK	)	CLERK
RIGSBY, and RAPHAEL	)	U. S. DISTRICT
MARTINEZ ZAVALA,	)	COURT
	)	SOUTHERN
Defendants.	)	DISTRICT IL
	)	BENTON OFFICE

Volume 3
BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT CHIEF JUDGE,
and a jury.

APPEARANCES:

For the Plaintiff: Mr. Thomas E. Leggans
Assistant U. S. Attorney
9 Executive Drive, Suite 300
Fairview Heights, Illinois 62208
618-628-3700

For the Defendant Randall Smith: Ms. Paula Greer Phillips
105 East Jefferson
Effingham, Illinois 62401
217-347-7662

For the Defendant Donald English: Mr. Robert Howerton
Harris, Lambert, et al.
300 West Main Street
Marion, Illinois 62959
618-993-2616

"Appendix F"

For the Defendant John Manley:

Mr. Michael W. Maurizio
Ronald E. Osman & Associates
1602 West Kimmel Street
Marion, Illinois 62959
618-997-5151

THE COURT: Ladies and Gentlemen, we are going to stand in recess till 9 o'clock tomorrow morning.

(The jury exits the courtroom.)

THE COURT: Okay. In addition, we have the – there's an English motion to exclude testimony by Ladonna Duncan; is that correct?

MR. HOWERTON: Yes.

THE COURT: Mr. Howerton, you're wanting to exclude this on the basis that the government cannot prove that the substance Ladonna Duncan speaks of is indeed cannabis.

MR. HOWERTON: Ground one.

THE COURT: And ground two is that the government must first establish by independent evidence the existence of basically a conspiracy.

MR. HOWERTON: Yes, and that this marijuana, I'll say, so-called marijuana is indeed marijuana that is related to the conspiracy that has been charged.

THE COURT: Mr. Leggans, anything you want to say on this?

MR. LEGGANS: Judge, I don't think I have anything to add beyond what I said in my response. I believe that the evidence will be that Ladonna Duncan is someone who is certainly familiar with cannabis and marijuana at this time. I think she's competent to testify to what it was she was dealing and what it was she was receiving from Mr. English just like Mr. Brenningmeyer was, and the conduct occurred in the time frame of the conspiracy, so I would ask the Court to admit it.

THE COURT: The Court's going to deny the motion. Again, for the record, Mr. Howerton, will show that her testimony is over your objection. If you want to make an objection, if a proper foundation isn't laid by the government on any portion of her testimony, go ahead and make your objection at that time.

Anything else other than the issue we got to take up tomorrow morning?

MR. LOCKWOOD: Only as it might relate toward consideration of that other issue. I think on the next witness that I've been advised about, this is someone that was prior to the conspiracy time, as far as I can tell, prior in time.

MR. LEGGANS: Judge, the conduct occurred in 1987.

MR. LOCKWOOD: Well, there was all the information that we received in the discovery, '83, '84, early '85.

MR. LEGGANS: Yes, that is correct, Your Honor. And she will be testifying to some drug trafficking. However, I believe that testimony is admissible under 404(b). In the notice I believe there will be some testimony concerning activities back into '83 and '84, although I haven't asked the witness to break it down in that fashion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 96-40031
	)	
Plaintiff,	)	Benton, Illinois
	)	December 12, 1996
vs.	)	
	)	FILED
RANDALL SMITH, DONALD	)	JAN 02 1997
ENGLISH, JOHN MANLEY, JACK	)	STUART J. O'HARE
RIGSBY, and RAPHAEL	)	Clerk, U. S. District
MARTINEZ ZAVALA,	)	Court Southern
	)	District of Illinois
Defendants.	)	Benton Office

Testimony of Ladonna Duncan
BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT CHIEF JUDGE,
and a jury.

APPEARANCES:

For the Plaintiff:
Mr. Thomas E. Leggans
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For the Defendant Randall Smith:
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"Appendix G"

For the Defendant John Manley:

Mr. Michael W. Maurizio
Ronald E. Osman & Associates
1602 West Kimmel Street
Marion, Illinois 62959
618-997-5151

Q. And who were you involved in drug activities with?

MR. HOWERTON: Judge, I'm going to object on the grounds that I have earlier asserted in my motion in limine, and I would ask, if the government has no objection, that I could have a continuing objection so I do not interrupt the witness.

THE COURT: It will be overruled and be a continuing objection.

MR. HOWERTON: I will alert the Court again at the time my continuing objection is over.

THE COURT: Right.

Q. (by Mr. Leggans) Had you been involved in drug activities before you met Mr. Rigsby?

A. Yes.

Q. Who were you involved in drug activities with?

A. The man I lived with, Brad Rogers.

Q. Had you been obtaining any marijuana from any other individuals?

A. Yes, I was.

Q. Who were you obtaining marijuana from?

A. Pepper English.

Q. And when were you getting marijuana from Pepper English?

A. When?

Q. Yes.

A. I was probably 15, 16.

Q. And when was the last time you obtained marijuana from Pepper English?

A. I would say '83. I mean the best I can remember.

Q. Now, how much marijuana were you getting from Pepper English?

A. Sometimes just a quarter, sometimes more.

Q. When you say just a quarter, a quarter what?

A. Quarter ounce.

Q. And what's the most you ever got from Pepper English?
A. A quarter pound.
Q. How much would you pay Pepper English for a quarter pound of marijuana?
A. Anywhere from 300 to 325.
Q. How was the marijuana that Pepper English had packaged?
A. Just in a bag.
Q. Now, getting back to Mr. Rigsby, did there come a point when you began living with Jack Rigsby?
A. I always had my own place, but he paid my bills.
Q. And where –
A. Or helped. I worked.
Q. Where was it that you were living when he was helping pay the bills?
A. On Airport Road.
Q. And what kind of a residence was that?
A. It was a mobile home.

* * *

MR. HOWERTON: Yes, Judge. Defendant English moves to strike the testimony of Ladonna Duncan insofar as it relates to, object on the grounds that it is immaterial, also irrelevant, and it is not relevant for this reason. I have a second superseding indictment here, Judge, that charges the conspiracy from November 1985 to on or about March 31, 1996. I can't lay my hands on it, but I state as an officer of the court, it's my memory that that has now been changed from 1984 to 1986. I'm not certain. But in any event, it does not matter to my motion.

Ladonna Duncan testified that all of her, if the jury believed her testimony, it is not evidence against Donald English that he is involved in a conspiracy because it is outside the indictment that he's called upon to defend.

THE COURT: Could it not come in under 404(b) with a limiting instruction?

MR. HOWERTON: If it did, Judge, it would then not be substantive evidence of his guilt, but it would then go in only to how –

THE COURT: Knowledge.

MR. HOWERTON: Some of those things. And at that

time I would be asking, if the Judge overrules my motion, then I would be asking for a limiting instruction and should be carefully tailored that they should not consider her testimony as proof that he was involved in a conspiracy, but you're only admitting it to show this, this and this.

Now, I would like to address that right now.

THE COURT: Yes.

MR. HOWERTON: I think the danger, if you're going to do that, then it would be likewise relevant under Rule 401 because it's advisable under 404. At this stage I would suggest to the Court that the danger of the unfair prejudice to Donald English outweighs the probative value to show knowledge, design, et cetera, et cetera. And that is so almost by definition because it is an act that is outside the time period of the indictment. And the danger is this, Judge, is the jurors could believe if anyone had ever done anything wrong anytime in their life, that is evidence from which they may make inferences.

THE COURT: Okay. Mr. Leggans.

MR. LEGGANS: Judge, at the outset, I had anticipated that the testimony was going to be that the activities with Mr. English occurred in 1985. That's – that was what was in the report. Because that did not happen, I believe a limiting instruction would be appropriate to the jury.

THE COURT: I agree. The Court will grant the motion of the defendant as it applies to the substantive evidence. The Court does believe that this would qualify as 404(b) evidence. The Court does not feel that there's undue prejudice, and that when the jury comes back and that's one reason. It hit me like a brick, too, Mr. Howerton. That's why I sent the jury out because when the jury comes back in, I want to address while this testimony is fresh in their mind, I want to give them a limiting instruction.

Okay. Mr. Lockwood.

MR. LOCKWOOD: Judge, the second superseding indictment that I have says November 1985. This witness testified in mid-1985 she went to Little Rock, Arkansas. On behalf of, for defendant Rigsby, I would like to join or make the same motion, basically due to the fact that this is beyond the scope of this conspiracy.

THE COURT: Mr. Leggans.

MR. LEGGANS: If the Court wants to give the same limiting instruction, that's fine.

THE COURT: The Court will do so. Bring the jury back.

(The jury enters the courtroom.)

THE COURT: Okay. Ladies and gentlemen of the jury, I told you early on when this trial started that in certain instances evidence may be admitted only concerning a particular party or only for a particular purpose and not generally against all parties or for all purposes.

The testimony you have heard from Ladonna Duncan, I want to give you what is called a limiting instruction. The testimony that you heard by her as it relates to the defendant English and the defendant Rigsby are being admitted for a limited purpose only. And that limited purpose is to show knowledge and intent rather than the propensity of these defendants to commit crimes that they have been charged with in this case. So you are to consider her testimony only for that limited purpose, not for what we call substantive evidence against these defendants, but only for the limited purpose of showing knowledge and intent.

Okay. Mr. Leggans, you may call your next witness.

* * * *

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Decided May 18, 1999

Before

Hon. Frank H. Easterbrook, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Nos. 97-2839, 97-3570, and 98-1101

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois.
v.	
RAPHAEL M. ZAVALA, JOHN MANLEY, and **JACK RIGSBY, SR.,** *Defendants-Appellants.*	No. 96-CR-40031-JPG **J. Phil Gilbert,** Judge.

ORDER

Raphael Zavala, Jack Rigsby, Sr., and John Manley, three of the five defendants-appellants whose cases were resolved in an unpublished order issued on March 25, 1999, have moved for rehearing with a suggestion for rehearing en banc. All of the judges on the original panel have voted to deny rehearing, and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly, the motions are denied.

"Appendix H"

Constitutional Provisions and Statutes Involved

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be infomred of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

28 U.S.C. Appendix Rules of Evidence 804(b)(3):

> (b) Hearsay exception. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ***
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim for the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Federal Rule of Criminal Procedure 8(b):

> Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Federal Rule of Criminal Procedure 14:

> Relief from Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election for separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

28 U.S.C. Appendix Rules of Evidence 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

28 U.S.C. Appendix Rules of Evidence 404(b):

> Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...

21 U.S.C.A. § 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commision of which was the object of the attempt or conspiracy.

21 U.S.C.A. § 841(a):

> Unlawful Acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

21 U.S.C.A. § 853(a):

> Property subject to criminal forfeiture.
>
> Any person convicted of a violation of this subchapter or subchapter II of the chapter punishable by imprisonment of more than one year shall forfeit to the United States, irrespective of any provision of State law—
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.

Rules of the Supreme Court, Rule 10.
Considerations Governing Review on Certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL NO. 96-40031-JPG
	)	
WILLIAM RANDALL SMITH,	)	
THEODORE "TED" BERKEY,	)	Title 21,
DONALD "PEPPER" ENGLISH,	)	United States Code,
DANNY JOE DENNISON,	)	Sections 841(a)(1),
JOHN "JAY" MANLEY,	)	846 and 853
JACK RIGSBY, SR., and	)	
RAPHAEL MARTINEZ ZAVALA,	)	
	)	
Defendants.	)	

SECOND SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

From on or about November 1985, to on or about March 31, 1996, in Massac County, within the Southern District of Illinois, and in Arizona, Kentucky and elsewhere,

WILLIAM RANDALL SMITH,
THEODORE "TED" BERKEY,
DONALD "PEPPER" ENGLISH,
DANNY JOE DENNISON,
JOHN "JAY" MANLEY,
JACK D. RIGSBY, SR., and
RAPHAEL MARTINEZ ZAVALA,

defendants herein, did knowingly and intentionally conspire with each other and with others unnamed in this indictment, to knowingly and intentionally distribute illegal controlled substances, including diverse amounts of marihuana, a Schedule I controlled substance, and diverse amounts of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

COUNT 2

On or about October 24, 1994, in Pulaski County, Illinois, within the Southern District of Illinois,

JOHN "JAY" MANLEY,

defendant herein, did attempt to kill Stephen Brenningmeyer with the intent to prevent Stephen Brenningmeyer from communicating to law enforcement officers information relating to the illegal drug trafficking activities of JOHN "JAY" MANLEY and JACK RIGSBY, SR., and others, in violation of Title 18, United States Code, Section 1512(a)(1)(c).

COUNT 3

On or about October 24, 1994, in Pulaski County, Illinois, within the Southern District of Illinois, the defendant,

JACK RIGSBY, SR.,

defendant herein, did attempt to kill Stephen Brenningmeyer with the intent to prevent Stephen Brenningmeyer from communicating to law enforcement officers information relating to the illegal drug trafficking activities of JOHN "JAY" MANLEY and JACK RIGSBY, SR., and others, in violation of Title 18, United States Code, Section 1512(a)(1)(c).

COUNT 4

On or about October 24, 1994, in Pulaski County, Illinois, within the Southern District of Illinois,

JOHN "JAY" MANLEY,

defendant herein, during and in relation to a crime of violence, to wit; an attempt to kill Stephen Brenningmeyer to prevent him from communicating to law enforcement officers information relating to the illegal drug activities of JOHN "JAY" MANLEY and JACK RIGSBY SR., as alleged in Count 2, did knowingly use and carry a firearm, that being a large caliber handgun; all in violation of Title 18, United States Code, Section 924(c).

COUNT 5

On or about October 24, 1994, in Pulaski County, Illinois, within the Southern District of Illinois,

JACK RIGSBY, SR.,

defendant herein, during and in relation to a crime of violence, to wit; an attempt to kill Stephen Brenningmeyer to prevent him from communicating to law enforcement officers information relating to the illegal drug activities of JOHN "JAY" MANLEY and JACK RIGSBY SR., as alleged in Count 3, did knowingly use and carry a firearm, that being a large caliber handgun; all in violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about December 27, 1995, in Hardin County, within the Southern District of Illinois,

DANNY JOE DENNISON,

defendant herein, did knowingly and intentionally possess in or affecting commerce; a firearm, namely a .357 Smith and Wesson revolver, serial number AAK5936, and a Browning 9mm semi-automatic pistol, serial number 24SPP52569, after having previously been convicted of a felony, to wit: Manslaughter, 2d degree, in Jefferson County District Court,

Jefferson County, Kentucky, all in violation of Title 18, United States Code, Section 922(g).

COUNT 7

On or about December 27, 1995, in Hardin County, within the Southern District of Illinois,

DANNY JOE DENNISON,

defendant herein, did knowingly and intentionally possess with intent to distribute approximately 24 kilograms of marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(b)(1).

Evidence has been received concerning statements said to be made by the defendants Rigsby, Smith and Zavala. It is for you to determine whether any of these defendants did in fact make the statements. If you find that any defendant did make a statement, then you must determine what weight, if any, you feel the statement deserves. In determining what weight, if any, should be given the statement, you should consider all matters in evidence having to do with the statement, including those concerning each of the defendants own personal characteristics and the conditions under which the statement was made.

Any such statement may not be considered by you as evidence against any defendant other than the one who made it.

Defendant English's Instruction No. 10
Modern Federal Jury Instructions
No. 3.09; 3.10 Modified

Seventh Circuit (1991)

"Appendix K"

Evidence has been received concerning statements said to have been made by some of the defendants. It is for you to determine whether a particular defendant did in fact make the statements. If you find that a defendant did make the statements, then you must determine what weight, if any, you feel the statements deserve. In determining what weight, if any, should be given the statements, you should consider all matters in evidence having to do with the statements, including those concerning the defendants' personal characteristics and the conditions under which the statements were made.

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 3
3.09 7TH CIRCUIT PATTERN JURY INSTRUCTION

"Appendix L"

SUPREME COURT OF THE UNITED STATES
OFFICER OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

AREA CODE 202
479-3011

June 18, 1999

Mr. Robert H. Howerton
Harris, Lambert, Howerton, Dorris
300 West Main Street
Marion, IL 62959

Re: Donald English
v. United States
Application No. A-1078

Dear Mr. Howerton:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on June 18, 1999, extended the time to and including August 16, 1999.

***

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
Assistant Clerk

"Appendix M"